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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 628

PEWEE COAL COMPANY, INC., *Petitioner*

v.

THE UNITED STATES

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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CITATIONS

CASES CITED:

Baltimore and Ohio R. R. Co. v. *United States*, 57 C. Cls. 140 (1922), affirmed 261 U. S. 593, 597 (1923), 67 L. ed. 816, 819 6
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United States v. *14.4756 Acres of Land*, 71 F. Supp. 1005 (D. C. Del., 1947) 8

CONSTITUTIONAL PROVISIONS:

Fifth Amendment 2, 3, 4, 5, 9

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Title 28, United States Code, Section 1255 2
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The petitioner, Pewee Coal Company, Inc., prays that writs of certiorari issue to review the judgments of the United States Court of Claims entered in the above cases on June 4, 1958, and the denial of the petitioner's Motion for Rehearing entered on October 8, 1958.

OPINIONS BELOW

The opinion of the Court of Claims in both cases is not yet reported officially except in slip form. The opinion, findings of fact, and the conclusion of law are reproduced in the appendix.

JURISDICTION

The judgment of the Court of Claims in both cases sought to be reviewed was entered on June 4, 1958. On July 7, 1958, the petitioner filed a motion for a rehearing in both cases. On October 8, 1958, the Court entered an order overruling the petitioner's motion. This Court has jurisdiction to grant the writs sought under the provisions of Title 28, United States Code, section 1255, providing that cases in the Court of Claims may be reviewed by the Supreme Court by writ of certiorari granted on petition of the United States or the claimant; and under the provisions of Title 28, section 2101, providing for the time in which a petition for a writ of certiorari must be filed.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, when the United States temporarily seized and operated for public use the petitioner's private business, the operating losses sustained by such operation are to be borne by the United States or the petitioner.

2. Whether, when the United States temporarily seized for public use the petitioner's leasehold interest in its coal mine, the United States is to be relieved from having to pay what has been demonstrated to be a fair and equitable rental value just because that happens to be of a kind which, by its very nature, is not readily rentable for short periods.

CONSTITUTIONAL PROVISION

These cases are based on the Fifth Amendment to the Constitution of the United States which provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present-

ment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

They are more particularly based on the last clause providing for the payment of just compensation for the taking of private property.

STATEMENT OF THE CASE

These cases involve the question of just compensation under the Fifth Amendment for three seizures, under executive order of the President, of a coal mining company to avert national strikes of unions. The takings, for which the petitioner brought his actions, occurred November 1, 1943, to June 21, 1944; April 10, 1945, to June 13, 1945; and May 22 1946, to June 30, 1947.

That these seizures by the Government amounted to a taking of property justifying compensation is not disputed. In a case involving the same parties concerning an earlier seizure under almost identical circumstances this Honorable Court unanimously agreed on that issue. *United States* v. *Pewee Coal Company*, 341 U. S. 114, 95 L. ed. 809. The method of seizure employed in the instant cases does not differ materially from that previously used by the Government in the initial *Pewee* case. When the Government took possession it constituted the president of the petitioner as the operating manager for the Government and in-

structed him to continue to operate the mine and sell coal as before unless otherwise directed. The president, in his capacity as operating manager, during the seizures in question, did not substantially alter the operations of the mine. The petitioner, while under Government control, continued to sell coal as before at the price it would bring. The corporation when not under Government control had been losing money and during the periods it was in possession of the Government it continued to lose money. The claims before the Court of Claims were for recovery of this loss and the fair rental value of the petitioner corporation during the seizures. They were based upon the Fifth Amendment to the Constitution of the United States and the provision of section 1491 of Title 28, United States Code, granting jurisdiction to the Court of Claims to render judgment upon any claim against the United States founded upon the Constitution.

The Court of Claims denied all recovery based upon a fair rental value of the property taken and allowed only those operating losses directly incurred by governmental acts, i. e., Government directives to petitioner to pay its employees certain "fringe" benefits.

REASONS FOR GRANTING THE WRITS

1. In *United States* v. *Pewee Coal Co., supra,* Mr. Justice Black in an opinion in which Mr. Justice Frankfurter, Mr. Justice Douglas, and Mr. Justice Jackson concurred, stated concerning the United States' obligation to bear the operating losses the following:

> "Like any private person or corporation, the United States normally is entitled to the profits from, and must bear the losses of, business operations which it conducts. When a private business

is possessed and operated for public use, no reason appears to justify imposition of losses sustained on the person from whom the property was seized. This is *conceptionally distinct from the Government's obligation to pay fair compensation for the property taken*, although in cases raising the issue, the Government's profit and loss experience may well be one factor involved in computing reasonable compensation for a temporary taking. Of course, there might be an express or implied agreement between the parties that the Government should not receive operating profits nor bear the losses, in which event the general principle would be inapplicable." (Emphasis added.)

In these cases had the Government acted on the assumption that its seizures of mines would be considered taking of property within the meaning of the Fifth Amendment, it is quite possible that an express agreement as mentioned by Justice Black above would have been solicited from the petitioner or other means devised to avoid or defray the expense of operating loss to the Government. Whether the reason why the Government's action was not based upon such assumption was though inadvertence, a calculated risk, or intentional, we do not know. What arrangement would have been entered into by the parties had the Government acted otherwise would require undue speculation. The facts are that the Government took possession of the petitioner's property without any offer of just compensation.

Manifestly, there was no express agreement by petitioner to bear losses incurred during the periods of seizure. Moreover, if there existed an agreement, implied either in law or fact, that the petitioner would bear the losses in this case, the premises for this conclusion are not apparent to the petitioner. The evi-

dence discloses no meeting of the minds in this respect which is essential to an agreement implied in fact. *Baltimore and Ohio R. R. Co.* v. *United States,* 57 C. Cls. 140 (1922), affirmed 261 U. S. 593, 597 (1923), 67 L. ed. 816, 819. Further, no basis is apparent for a quasi-contract or agreement implied by law to the effect that, in the absence of other agreement, plaintiff should bear the losses of its business during the seizure by the Government.[1]

Clearly, this is an important issue which should be considered by the highest court in the land. It seems to petitioner that the concept enunciated by Justice Black in the initial *Pewee* case is correct in principle and is of sufficient consequence to warrant review at this time.

2. The Court of Claims in its opinion in these cases denied the petitioner recovery based on a fair rental value of the property taken primarily on the basis that the mine would not have been rentable for the short periods of time during which the Government was actually in possession. It is clear to petitioner that that is not a question of fact upon which the finding of the Court of Claims would be binding, but, on the contrary, is a question of law.

The evidence of rental value before the court below may be summarized as follows: There were two bona fide offers from a responsible party to rent the peti-

[1] For discussion of contracts implied in law see *Hickman* v. *United States,* 135 F. Supp. 919 (W. D. La., 1955). It may be significant that suits against the Government on the basis of a contract implied by law are not authorized. While petitioner thus has some doubts concerning the jurisdiction of that court to treat with an affirmative defense based on agreement implied by law, this issue of some complexity need not be raised as it appears obvious that the defense must fail on its merits.

tioner's property (Pltf. Exs. 21 and 22). In the first instance, the offeror was New England Industries, Inc., and in the second the offeror was the Standard Ore & Alloys Corporation, a subsidiary of New England Industries, Inc. (Tr. 85, 86). The petitioner was the lessee of two lessors, the East Tennessee Iron and Coal Company and the Coal Creek Mining & Manufacturing Company. Under the first offer, the petitioner was to receive a 20¢ per ton royalty and the petitioner's lessors a 10¢ per ton royalty. However, one of petitioner's lessors, Coal Creek Mining & Manufacturing Company, refused to approve the agreement. Under the second offer, the petitioner was to receive a 20¢ per ton royalty and the petitioner's lessors, a 15¢ per ton royalty. Again, however, the Coal Creek Mining & Manufacturing Company refused to approve the agreement on the ground that the royalty to the lessors was too low. Under the second agreement, it was provided that the sub-lessee could, at any time it determined, "in its own judgment that it is unable to operate hereunder at a reasonable profit, then the second party [sub-lessee] may terminate this lease by giving to the first [petitioner] and third parties [petitioner's lessors] ninety days prior notice to that effect" (Pltf. Ex. 22, par. 16).

It should be emphasized again that the opinion below makes much of the fact that no one would have rented petitioner's mine for the short period of time during which the Government was in possession. From the foregoing provision it is clear that the prospective sub-lessee would have had the same type of possession which the Government had. Each could terminate its possession at its own option. This makes the court's reliance on the shortness of the Government's possession to deny the petitioner a fair rental value unjust.

Under almost the identical powers of possession which the Government had, the prospective sub-lessee was willing to pay the petitioner a royalty of 20¢ per ton. It is unrealistic to say, under these circumstances, that the Government took nothing of value from the petitioner.

The total effect of that portion of the opinion below is that the Government now is relieved from having to pay what has been demonstrated to be a fair rental value when it temporarily seizes private property if that property happens to be of a kind which by its very nature is not readily rentable for short periods, in these cases operating coal mines. The fair rental value to be paid for a temporary use is determined as of the time of the taking. *Johnson* v. *United States*, 4 C. Cls. 248; *Pope* v. *United States*, 26 C. Cls. 11; *United States* v. *14.4756 Acres of Land*, 71 F. Supp. 1005 (D. C. Del., 1947). At the time of the taking in these cases no one knew how long the Government would remain in possession. Possession could be terminated only by the United States. It is inconceivable that the Government would have seized the property if at the time of the taking the property had no value. Thus, the opinion below, based on an erroneous conclusion of law, unjustly relieves the Government of paying just compensation for taking private property.

3. It is vital that this Court grant the petition for the writs sought because this technique of temporarily taking private property to meet war or emergency needs is a most useful device. It is, however, important that in such cases the interest of the Government, admittedly great, is not allowed to deprive citizens of their constitutional rights. The total effect of the opinion below is to relieve the Government from paying

its legal obligations in such situations. The Fifth Amendment to the Constitution of the United States prohibits the United States from taking private property without just compensation. To sustain the present cases would substantially impair the vitality of the Fifth Amendment's restriction on the Government and protection of the individual. Sensitive men know that it is becoming more and more difficult for the individual citizen to withstand the force of Government. When a proper case such as this is brought before the judicial branch, this Court should not hesitate to uphold the individual. There is no other bulwark to which the citizen may turn.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writs of certiorari should be granted.

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